THE HON'BLE SRI JUSTICE C.V. RAMULU

Friday, 1st day of September, 2006

W.P.Nos.5911, 11590 and 13695 of 2005

W.P.No.5911 of 2005

Between:

B. Prabhakar Reddy ... Petitioner

and

The Superintending Engineer,
I & CAD, Irrigation Circle,
Nizamabad and 2 others ... Respondents

THE HON'BLE SRI JUSTICE C.V.RAMULU

W.P.Nos.5911, 11590 and 13695 of 2005

COMMON ORDER:

In these three Writ Petitions, common questions of law and fact arise for consideration; therefore, they are being disposed of by this common Order.

Petitioners are contractors with the Irrigation Department of Government of Andhra Pradesh. They have entered into agreements for execution of certain works. When the agreements were entered into, the seigniorage fees to be charged was as indicated below:

Sl.No.	Material	Seigniorage charges
1	Sand	Rs.30.00/cum
2	Metal	Rs.33.00/cum
3	R.R.Stone for masonry	Rs.33.00/cum
4	Rivetment stone	Rs.33.00/cum
5	CRS Stone	Rs.33.00/cum
6	Gravel	Rs.13.00/cum
7	Earth	Rs.13.00/cum

In fact, vide G.O.Ms.No.217, Industries and Commerce (MI) Department, dated 29-9-2004, Government of Andhra Pradesh enhanced the seigniorage fee as under:

Sl.No.	Material	Seigniorage charges
1	Sand	Rs.36.00/cum
2	Metal	Rs.45.00/cum

3	R.R.Stone for masonry	Rs.45.00/cum
4	Rivetment stone	Rs.45.00/cum
5	CRS Stone	Rs.45.00/cum
6	Gravel	Rs.20.00/cum
7	Earth	Rs.20.00/cum

The case of the petitioners is that firstly, the respondents are not entitled to collect enhanced seigniorage fee as per G.O.Ms.No.217, dated 29-9-2004 and secondly, the agreements entered into by them with the respondents are after G.O.Ms.No.217, dated 29-9-2004 and despite this, with eyes wide open, respondents have entered into agreements fixing the seigniorage fee as per G.O.Ms.No.243, dated 8-5-1986, as noticed above. However, respondents are collecting seigniorage fee as per G.O.Ms.No.217, dated 29-9-2004. Neither there is any agreement to that effect nor it is permissible under the law. In the teeth of G.O.Ms.No.217, dated 29-9-2004, when an agreement is made and the seigniorage fees as prescribed in G.O.Ms.No.243, dated 8-5-1986 is collected, it must be deemed that the provisions of G.O.Ms.No.217, dated 29-9-2004 are not applicable to the contracts in question.

Be that as it may, learned counsel appearing for the petitioners fairly conceded that, may be, the petitioners are liable to pay seigniorage fee as per G.O.Ms.No.217, dated 29-9-2004 and also in terms of the contract, but the respondents are liable to reimburse the equitable amount, while settling their final bills by increasing the rates as per Section 64-A of the Sale of Goods Act,1930 (for short 'the Act'). There cannot be any dispute that a work contract is nothing but a sale of goods as defined under Article 366(29A)(b) of the Constitution of India and the contract between the parties is a statutory contract.

Article 366(29A)(b) reads as under:

> "366 (29A) Tax on the sale or purchase of goods includes—
>
> (a)……..
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract."

Of course, once it is a sale of goods, Section 64-A of the Act takes care of the situation. The said Section reads as under:

> "**64-A. In contracts of sale, amount of increased or decreased Taxes to be added or deducted.**—(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid, where tax was chargeable at that time:
>
> (a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increased of tax, and he shall be entitled to be paid, and to sue for and recover such addition, and
>
> (b) if such decrease or remission so takes effect that the decreased tax only or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or tax be sued for or in respect of such deduction."

In this regard, learned counsel for the petitioners placed reliance on the Judgment of a Division Bench of the Madras High Court in **N. SUNDARESWARAN v. KRISHNA REFINERIES**[1] wherein it was held as under:

> "The delivery of goods and payment of price are concurrent. Expatiating this purpose Section 32 further says that the seller shall be ready and willing to give possession of the goods to the buyer in

exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. Here again 'exchange' is synonymous with 'concurrent' appearing in the earlier portion of Sec.32. It is, therefore, clear that unless there is a consensus ad idem between the contracting parties in a contract of sale of goods regarding payment of price, it would be difficult to expect either the buyer to purchase or the seller to supply the goods under it. Sec.64-A is a special provision in the Sale of Goods Act, which provides for a specified contingency. In contracts of sale of goods, if during the working or performance of the same, customs or excise duty or tax on the sale or purchase of goods is imposed by any law for the time being in force, then, if such an imposition takes effect, Sec.64-A(a) provides that the seller may add so much of such increase to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax and he shall be entitled to be paid and to sue for and recover such addition. This statutory entitlement vested in the seller to claim the increase in excise duty, as in the instant case, in case such a duty takes effect during the course of the working of the contract is, a right, which is per se enforceable. Of course, there may be a contract to the contrary. So long as there is none, the force of this Section could compel the seller to demand as of right the payment of such levy or increase in levy in excise duty and add the same to the contract price and ask for its payment. The compendium of the initial contract price and the tax or the duty or the increase in the excise duty would automatically become the agreed price between the parties. Such payment of price and delivery of goods are concurrent conditions and one is an exchange for the others. As per Sec.32 of the Sale of Goods Act, any attempt on the part of the buyer to avoid such a statutory obligation would entitle the seller not to perform his reciprocal concurrent obligation of delivering the goods."

Further, he has drawn attention of this Court to the Judgment reported in **M/s. SRAMAJIBI STORES v. UNION OF INDIA**[2] wherein it has been held as under:

"9. In my opinion, keeping in view Art.14 of the Constitution, a purposeful or a fair approach has to be adopted in contracts between the State and citizens. In any case, the purpose for which S.64-A was enacted has to be kept in view. The purpose obviously was that increase or decease in duty should be taken note of in the case of contracts concluded prior to the increase or decrease. No party should be made to unnecessarily gain or suffer on account of State action in increasing or decreasing duty……"

From the above decisions, it is clear that the increase or decrease in duty should be taken note of in the case of contracts concluded prior to the increase or decrease and no party should be made to unnecessarily gain or suffer on account of State action in increasing or decreasing duty. The statutory entitlement under Section 64-A of the Act is vested in the seller to claim increase in the duty and such duty takes effect during the course of working of the contract is, a right, which is *per se,* enforceable. Unless there is a contract contrary to Section 64-A of the Act, the seller (petitioners) are entitled to demand as of right the payment of such levy or increase in levy and add the same to the contract price and ask for its payment. Such payment of price and delivery of goods are concurrent conditions and one is an exchange for the other. If the buyer refused to pay the price payable, either expressly or by necessary implication, and categorically maintains that he is not liable to pay a part of the price, then the parties are not in unison insofar as one of the concurrent conditions in the matter of performance of the contracts involving sale of goods. Therefore, the buyer is liable to share the enhanced liability of the seller and he is also entitled for the proportionate enhanced rates of work.

Learned Government Pleader submitted that royalty is not a tax and the mistake crept in **INDIA CEMENT LTD. V. STATE OF TAMILNADU**[3] has been explained at paragraph-79 of **STATE OF WEST BENGAL & ANOTHER v. KESORAM** [4] and held that royalty is not a tax and cess on royalty is a tax; therefore, it must be deemed that the seigniorage charge is not a tax or duty; as such, Section 64-A of the Act has no relevance for the purpose of these cases, particularly for reciprocal performance and reimbursement by the respondent-

buyer. Then the question arises as to whether the seigniorage fee is a tax or duty and as such, Section 64-A of the Act is applicable to the present cases. In this regard, learned counsel for the petitioners drawn attention to paragraph-140 of Judgment in **KESORAM**'s case (4 supra), which reads as under:

> "In a nutshell
> 140. The relevant principles culled out from the preceding discussion are summarized as under:-
>
> (1) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.
>
> (2) Power of 'regulation and control' is separate the distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject matter of two taxes by reference to the two Lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.
>
> (3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.
>
> (4) Entries 52, 53 and 54 in List I are not heads of

taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52, 53, 54 in List I. It is for the Union to legislate and impose limitations on State's otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral bearing lands) by reference to Entry 50 and 49 in List II and lay down the limitations on State's power, if it chooses to do so, and also to define the extent and sweep of such limitations.

(5) The Entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non-obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One - Is still possible to effect reconciliation between two Entries so as to avoid conflict and overlapping?

Two - In which Entry the impugned legislation falls by finding out the pith and substance of the legislation?

and

Three - Having determined the field of legislation wherein the impugned legislation falls by applying doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(6) 'Land', the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt anyone of the well known modes of determining the value of

the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of 'regulation and control' belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the 'control of industries' in Entry 52 and 'for regulation of mines or for mineral development' in Entry 54. Such control, regulation or development must be 'expedient in the public interest'. Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to' any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue

or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248 (2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II can also not be levied by the union though as stated in Entry 50 itself the union may impose limitations on the power of the State and such limitations, if any, imposed by the Parliament by law relating to mineral development and to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

and submitted that Entries 52,53 and 54 in List I are not heads of taxation. They are general entries and fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of Union having enacted laws by reference to Entries 52 to 54 in List I. It is for the Union to legislate and impose limitation on States, otherwise, the plenary powers to levy taxes on mineral rights or taxes on lands (including mineral bearing land) by reference to Entries 50 and 49 in List II and lay down the limitations on the State's power, if it chooses to do so and also to define the extent and sweep of such limitations.

Admittedly, the Mines and Minerals (Regulation and Development) Act,1957 was brought into existence under Entry 54 of List I for regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament, by law, to be expedient in the public interest. Coming to the State Legislatures, Entry 23 of List II vests power in them to enact laws on the regulations of mines and minerals development, subject to the provisions of list I with respect to regulation and development under the control of the Union. Further, in view of Section 15 of the Mines and Minerals (Regulation and Development) Act,1957, the State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. Clause (g) of Section 15(1-A) of the Mines and Minerals (Regulation and Development) Act,1957 reads as under:

> "(g) the fixing and collection of rent, royalty, fees, dead rent, fines or other charges at the time within which and the manner in which these shall be payable"

Andhra Pradesh Minor Minerals Concession Rules,1966 were obviously made in exercise of the powers conferred by sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act,1957. Rule 10 of the said Rules, which deals with seigniorage fee or dead rent, reads as under:

> "**10. Seigniorage fee or dead rent:-** (1) When a quarry lease is granted under Rule 9, the seigniorage fee or dead rent, whichever is higher, shall be charged on all miner minerals despatched or consumed from the land at the rates specified in Schedule I and Schedule II, as the case may be.
>
> (2) to (4)……..."

Of course, seigniorage fee and dead rent seem to be one and the

same, but they are collected under two different contingencies. Seigniorage fee is collected on the extraction of minerals, whereas dead rent is collected when there is no mineral mining activity. It is further stated that there is no *quid pro quo* in both these collections. Therefore, it must be deemed that it is either a tax or a duty collected by the State. In the absence of any such provision of law for fixing dead rent and/or seigniorage fee, except the enabling provision under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957, it must be deemed that the dead rent/seigniorage fee is collected as per the powers vested under Entries 49 and 50 of List II of the Constitution. That is the only power, which enables the State to collect the taxes. Therefore, seigniorage fee or dead rent is a tax or duty. Here, it is interesting to notice that A.P.Minor Minerals Concession Rules,1966 are made not by the State Legislature, but are made as per the enabling provision under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957. It would have been altogether a different matter had the State Legislature enacted a law under Entry 50 of List II of the Constitution, which says 'Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development'. Unless and until the State enacts a law for collecting taxes or duty or fee or charges as contemplated under Entry 50 of List II of Constitution, the seigniorage fee cannot be treated as a tax at all.

Further, it seems what is a royalty insofar as major minerals are concerned, is a seigniorage fee for the minor minerals. A royalty is not a tax as noticed in ***KESORAM*** 's case (supra). The Rules made under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957 cannot be equated to that of a legislation made under Entry 50 of List II. Therefore, the contention of the learned counsel for the

petitioners that the State Government has no other power except the power vested under Entry 50 of List II for fixing and collection of rent, royalty, dead rent, fee, fines and other charges and, therefore, the power exercised under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957 while making A.P. Minor and Mineral Concession Rules,1966, should be equated to that of the legislative power under Entry 50 of List II of the Constitution, cannot be countenanced.

Unless and until the seigniorage fee/dead rent is a tax or duty, the application of Section 64-A of the Sale of Goods Act does not arise. As such, the argument of the learned Government Pleader that Section 64-A of the Act has no application to the facts of these cases has to be irresistibly accepted. Of course, In the 'Words and Phrases' (II Edition) of Baby Krishnan & Prafulla C. Pant, the word 'seigniorage' is defined as under:

> "In Section 4(1) the Kannan Devan Hills (Resumption of Lands) Act,1971 , the expression "seigniorage" is employed to enforce a prerogative of the State de hors the right of ownership in the property. The expression 'seigniorage' is not defined in the Act. It is not a term of art. It has to be understood in the meaning it had in English. The relevant meaning of the expression given in the News Shorter Oxford Dictionary is:
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> > 'Profit made by a Government by issuing currency; the difference or margin between the face value of coins and their production costs; the Crown's right to charge a percentage on bullion brought to a mint for coining; *the amount charged, something claimed by a monarch or feudal lord as a prerogative*.

From the above meaning, it may be seen that the expression "seigniorage" has two distinct meanings: (*i*) profit made by a Government by issuing currency, the Crown's right to charge a percentage on bullion brought to a mint for coining; and (*ii*) something claimed by a monarch or feudal lord as a prerogative. We are unable to accept that seigniorage is used in Section 4 synonymous with "kuzhikanam" because the legislature has used the said expression in clause (*d*) of Section 3 in the sense of conferment of right of ownership by the State on payment of royalty, kuzhikanam.

The distinction between kuttikanam and seigniorage is explained by the Kerala High Court in *George A. Leslie* v. *State of Kerala* (AIR 1970 Ker.21: 1969 KLT 378) in the following words:

> "We do not think that 'kuttikanam' is either a fee or tax. A tax or fee is levied in the exercise of sovereign power. We think that in the context 'kuttikanam' means the Government's share of the value of the reserved trees."

And it has been approved by this Court in *State of Kerala* v. *Kanan Devan Hills Produce Co. Ltd.* AIR 1999 Supreme Court 878: 1999(1)JT 276 in para 20 which reads as under:

> "It was further held by Mathew, J. that kuttikanam being the Government's share of the value of the trees owned by the Government it has the power to fix the value of the trees. We agree with the reasoning and conclusions reached by Mathew, J. Since the ownership over the tree growth and timber in concession area vests with the Government it has a right to impose kuttikanam on the removal of the trees from within the concession area."
>
> (Kannan Devan Hills (Resumption of Lands) Act,1971, Sec.4(1). *Divisional Forest Officer v. Tata Finlay Ltd.* AIR 2001 Supreme Court 2672: 2001(5) JT 332: 2001(4) Scale 270…"

May be, there is no *quid pro quo* in collecting the seigniorage fee and this goes to the exchequer as a revenue. But, so long as the Rules are made under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957 and they are not traceable to Entry 50 of List II of Constitution, it cannot be said, whatever collected by the State is a tax. In fact, strictly speaking, the Rules made under Section 15 of the Mines and Minerals (Regulation and Development) Act,1957 also fall into Entry 54 of List I. In the scheme of Lists in the Seventh Schedule, there exists a clear distinction between general subjects and legislation and heads of taxes and they are separately enumerated. The power of regulation and control is separate and distinct from the power of taxation and so are the two fields for the purposes of legislation. The taxation may be capable of being comprised in the main subject of general legislative head by placing extended construction, but that is not the rule for deciding the

appropriate legislative field for taxation between List I and List II. May be, tax on mineral rights would ordinarily refer to tax on extraction of minerals or on the right to do so fix a rate under Entry 50 of List II; but, that would not include the seigniorage fee for the minerals extracted by the lessee, on return for the privilege of working it and it is not a tax though compulsorily exacted and recoverable by the Government as arrear of land revenue, since it falls under Entry 54 of List I. Further, it is to be noticed that A.P. Minor Mineral Concession Rules,1966 cannot be said to be capable of being traced in the main subject of general legislation head as a tax for placing an extended construction, such as, Andhra Pradesh Gram Panchayat Act and A.P. Municipalities Act etc., where the power of taxation is conferred in the general legislation and such taxes and/or fee in a given case could said as a duty or tax as contemplated under Section 64-A of the Sale of Goods Act. A.P. Minor Mineral Concession Rules,1966 are not made by the State Legislature and they are only the Rules made under the enabling Section 15 of the of the Mines and Minerals (Regulation and Development) Act,1957. Therefore, the seigniorage fee/charges deducted from the petitioners' bills in the course of contract is neither a tax nor a duty as contemplated under Section 64-A of the Sale of Goods Act. As such, the petitioners are not entitled for any benefit under Section 64-A of the Sale of Goods Act. The Writ Petitions are devoid of merits and are liable to be dismissed.

Accordingly, the Writ Petitions are dismissed. No order as to costs.

01-9-2006

prk

[1] AIR 1977 Madras 109

[2] AIR 1982 Delhi 76

[3] 1990(1) SCC 12

[4] 2004(1) JT 395